

Radical Therapeutic Jurisprudence

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RADICAL THERAPEUTIC JURISPRUDENCE

INBAR COHEN*

Abstract

Problem-Solving Courts (“PSC”) are one of the prominent developments in the criminal justice system in the last three decades. They are an interdisciplinary rehabilitative initiative designed to provide a profound solution to crime. This combination of therapeutic knowledge in criminal proceedings has been shown to radically change legal discretion, creating a “theralegal” approach, which occasionally holds therapeutic considerations above legal ones, forming a new theoretical outlook termed as the Radical Therapeutic Jurisprudence (“RTJ”). Drawing from RTJ theoretical thinking, this Article will discuss whether PSCs offer a profound solution to crime, or, if a radical approach is required to prevent offering more than a Band-Aid fix.

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I suggest we start with getting to know each other and I think we'll find things we have in common.

My name is Inbar. I am a social worker and my PhD is in Criminology. My main research focus is the interchange between behavioral science and the law.

I guess this interchange also exists here in the audience, considering the fact that the conference is a joint initiative of the Schools of Social Work and Law.

Another thing we have in common is the fact that most of the people here today recognize that there is a problem in the social services system, be it welfare or legal services.

It feels like what started out as a good idea, an admirable effort of the state to help people, ends up sometimes hurting them.

So, today, I want to offer my take on the matter, based on the research I conducted in Israel and here at the University of Maryland, Baltimore last year with Professor Corey Shdaimah.

I think the meeting of social work and law is not a chance encounter. Professor Issy Doron from the School of Social Work at the University of Haifa in Israel claims that social work and the law can be perceived as two monikers of the same social tool—a tool that serves the same purposes: guarding human rights, helping marginalized communities, and promoting social change.

On the other hand, through the provision of social services—be it welfare or legal services—both professions hold a great deal of power and authority over individuals. Social workers can remove children from their homes based on what they perceive as maintaining their safety and taking care of their wellbeing. In Israel, social workers can recommend keeping people in detention before or during a trial, or not granting them early release from prison based on rehabilitative considerations. When the court accepts social workers' recommendations, they gain legal status. The law as a legal structure represents the "public interest." We have to ask ourselves—who is that public? Are people from marginalized communities part of this public? Is the law designed to help them? Does it represent their interests? Who writes the law?

So, is this interchange between social work and the law a joint venture for social change or tools of power?

I want to offer my observation on the intersection between social work and the law, and my take on this question. It may be used as a lens while listening to the following interesting presentations we have today.

So, many years ago, I worked at the sexual assault crisis center in Tel Aviv as the head of the witness assistance program. Part of my role was to facilitate courses for prosecutors and judges regarding the emotional repercussions of sexual assault. My role made me realize how important mental health and therapeutic knowledge is to legal practitioners. Not just to determine the appropriate rehabilitative venue, but also to determine a victim's credibility, which is highly relevant to the verdict. In my PhD, I studied this topic further

and examined the way mental health knowledge is implemented in sexual assault proceedings in Israel. I found that in some cases its implementation led to shifting the needle in what constitutes due process, making therapeutic considerations more important than legal ones. I coined it as the “theralegal discretion.”¹

My dissertation was based on therapeutic jurisprudence, commonly referred to as “TJ,” which is a legal theory developed by Professor David Wexler and the late Professor Bruce Winnick.² TJ perceives the law, legal actors, and legal setting as therapeutic agents, essentially adding an additional purpose or goal for legal systems. In addition to representing the public interest, retribution, guiding behavior, and guarding victims’ rights, the law—its’ rules, procedure, and legal practitioners’ behaviors—should strive to have therapeutic consequences and avoid anti-therapeutic consequences, as long as this aim does not infringe on due process. What I found out in my research was that the implementation of mental health knowledge in legal proceedings radically changed the legal construct of due process in some cases. In these cases, I saw not just TJ, but also what I coined as “Radical TJ.” For example, vital evidence, such as therapeutic records that could add to the victim’s credibility in court, were not submitted as not to invade the victim’s privacy and damage the therapeutic process. This is a classic case of therapeutic considerations trumping legal ones. This is Radical TJ: profound changes to due process to accommodate therapeutic considerations and consequences.³

Therapeutic jurisprudence was developed by legal professionals and academics as a response of their disenchantment with the U.S. legal system, where nothing worked from anyone’s perspective. Punishment and incarceration did not reduce crime or recidivism. This is a reality of mass incarceration and collateral consequences, which eventually became a target for criticism, including the vast racial disparities. Some perceived these as a human rights violation, some others as an unnecessary waste of the taxpayer’s money. Legal practitioners, as well as politicians, felt the need to come up with a different way to tackle crime.

One of the proposals aligned with TJ was again, a noble attempt, which was to approach problems that lead to offending from their root. We know that most of the offenders come from marginalized communities. Most of them live in poverty, many suffer from mental illness or addiction. Some don’t have education or vocational training to secure living wage employment.

1. See generally Inbar Cohen, Tali Gal & Guy Enosh, *Two Roads Converge: The Interchange Between the Mental Health and Legal Discourses in Sexual Assault Trials*, 32 SOC. & LEGAL STUD. 441 (2022).

2. See generally DAVID B. WEXLER & BRUCE J. WINNICK, *THERAPEUTIC JURISPRUDENCE* (4th ed. 2008).

3. See Cohen et al., *supra* note 1, at 455–59.

The idea was to enroll them in rehabilitative programs that help them deal with addiction, mental health problems, or past traumas, and to receive vocational training, education, or employment support, and then they will not resort to criminal behavior—a perfect interchange between the law, social work and other therapeutic professions.

This thought led to the establishment of the Problem-Solving Courts [“PSCs”]. PSCs are based on teamwork among relevant legal and social actors, such as prosecutors, defense attorneys, social workers, and relevant members of the community. The team develops a treatment program designed to address the underlying circumstances leading to the criminal behavior and monitor its fulfillment while trying to motivate the defendant to complete the process.

Since the first PSC established in 1989 in Miami, thousands of PSCs have been established across the [United States] and include drug courts, veteran courts, domestic violence courts, mental health courts, prostitution courts and so on. This has led to a global phenomenon—PSCs were established all over the world, and the problem-solving court movement was created. There are PSCs in Australia, New Zealand, [and] England. Even in tiny Israel, we have 10 PSCs and are about to open 8 more.

I know, it doesn’t sound like much, but we are a small country. We are only 9 million people, only have six state districts, only six district courts; trust me, it is a lot.

The problem-solving courts are the epitome of TJ. They are designed not only to avoid antitherapeutic consequences but also to encourage therapeutic ones. This is the law not just as a therapeutic agent. This is the law as a therapist.

So, for me, a social worker and a criminologist, it is a treat to examine this phenomenon through a Radical TJ lens—to see if PSCs offer a radical solution—and this is where Macro Social Work came in handy when I studied the Prostitution Diversion Program in Philadelphia with Professor Corey Shdaimah of the School of Social Work, here at UMB last year.

As a disclaimer, not all PSCs tailor rehabilitative plans for their participants. Some focus on surveillance or only the provision of welfare benefits. Even those which try to tailor a rehabilitative plan and may succeed in helping people stop offending, escape poverty, and enhance their wellbeing, even then, when we look at the greater scheme of things, we cannot say that PSCs offer anything new under the sun. In Israel, for example, there was a decrease in the crime rate in recent years, but it was not due to the establishment of the problem-solving courts; it was due to early release initiatives and decriminalization of various offences. During COVID, we could also track a decrease in the crime rate, which was evident in other countries. However, it did not include domestic violence offenses, which were unfortunately on the rise.

So, why is that? Why does tackling the problem from its root not help?

Because maybe it is not the actual root.

I always thought that Social Work has a lot to contribute to legal thinking and I think that is especially true in this case. Particularly macro social work, which aligns perfectly with Radical TJ.

When we studied Philadelphia's prostitution court, which is called Project Dawn Court, we found that all the participants were offered (actually mandated) sexual trauma treatment, under the assumption that all of them were sexually assaulted, often as children, and that the sexual assault contributed to sex work. Another treatment that most of them were required to attend was for substance use disorder. Along with those two therapeutic interventions, participants were offered help with receiving social services and benefits.

When we interviewed participants, as well as legal and the therapeutic staff, we found that they were critical of the rehabilitative programming offered by Dawn Court—but that was not all. They were also critical of the lack of social solutions. Macro solutions that they wanted to see included reallocating funds from law enforcement to the establishment of lacking social services, such as vocational training and housing. They also offered legislative initiatives, like decriminalizing prostitution or shifting criminalization to clients.

Their criticism is one that we are very familiar with in macro social work circles—social problems should receive social solutions and offering micro interventions may well solve this or that individual's problem, but on a greater scale, it will be no more than a Band-Aid solution. It may even deflect attention from the social problem or risk blaming individuals for their failure to rescue themselves from larger social forces.

The social problem will remain.

So, is it radical TJ?

We would have to answer no to this question; what was interesting for us was that none of the research respondents thought that the social solutions they offered were the court's responsibility.

What would need to happen to make Dawn Court a form of radical TJ?

If the court would use its social capital, its connection to social services and public officials, to promote social change, that would make it radical because such moves would essentially come at its own expense. The court promoting a reality in which selling of sex is not a crime—and using its funding to broaden social services—that would be radical. Having the court collaborate with other social systems, such as the welfare system, until there is no longer any need for the court—this would be radical therapeutic jurisprudence, as suggested by the application of macro social work practice and values.

So, for today, when listening to all the wonderful presentations that await us, try to listen through radical or even radical TJ ears, as filtered through the lens of macro social work. And we will meet again at the end of the day and exchange free radical thoughts.